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In the Supreme Court of the United States

OCTOBER TERM, 1984

DR. LEE ROY BLACK, Director of the Missouri Department of Corrections and Human Resources; DICK D. MOORE, Chairman, Missouri Board of Probation and Parole,

Petitioners,

vs.

NICHOLAS J. ROMANO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

The brief of respondent is disturbingly replete with inaccuracies and misstatements, both factual and legal. Additionally, respondent improperly proffers "evidence" to this Court which was not before the District Court below, and persistently disregards the statutory and decisional law concerning federal habeas corpus review of state court factual findings. Since these factual misstatements are uniformly self-serving to respondent, and since many of them have no bearing upon the legal issues before this Court, it is inferable that respondent is attempting to misrepresent the equities in this case by implying that injustice has been done to him when no such injustice ex-

ists. To counter that implication, and to show the lack of merit in respondent's constitutional analysis, the petitioners must refute in detail respondent's version of the relevant facts.

I. RESPONDENT'S ACCOUNT OF THE FACTS

A. The Plea of Guilty and Sentencing Proceedings

In the eight years since respondent's plea of guilty to the transfer and sale of controlled substances, he has advanced no legal challenge whatsoever, in state or federal court, to the validity of the guilty plea proceeding.[1] Nor is such a challenge an element of the federal habeas corpus petition at bar. Nevertheless, respondent devotes a substantial part of his Statement of the Case to attacking the fairness of this proceeding and impugning the wisdom of the presiding judge, particularly as to the decision on sentencing (Resp.Br. 4-6).

The timing of respondent's attack is most convenient from his point of view. Because the initial sentencing decision is not legally at issue in the present habeas corpus action, and further because respondent successfully opposed an evidentiary hearing in which the state Circuit Judge might have testified on this subject, this Court lacks access to some of the information known to the sentencing judge concerning the respondent, and the precise factors that went into the sentencing decision are a matter of conjecture from an incomplete record. For example, the

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1. Under Missouri law, defendants who are convicted or plead guilty can independently challenge the sentence imposed on the ground that it was excessive in light of the crime, where (as respondent claims to be the case here; Resp.Br. 5-6) it is alleged that the sentence was the product of prejudice by the sentencing judge. *Hill v. State*, 543 S.W.2d 809 (Mo.App. 1976); *Abell v. State*, 606 S.W.2d 198 (Mo.App. 1980).

original presentence investigation filed with the state court, which expressly opposed the granting of probation (see J.A. 33, 43), was never presented as an exhibit in the District Court below, and the information contained in it is thus not a matter of record.[2] Respondent's belated efforts to call into question the fairness of the sentence he received should be summarily rejected on this basis.

Even given the facts available, respondent's current attack is a travesty. The record is utterly undisputed that respondent was no mere possessor or small-scale seller of illegal drugs; he was apprehended while conveying *26 pounds* of marijuana, in handy one-pound packages, in exchange for heroin (J.A. 27-28, 36-37, 40).[3] The Circuit Court was perfectly justified in concluding, from respondent's prior conviction of marijuana possession and a relatively recent marijuana arrest (plus whatever information was present in the presentence investigations) that respondent was anything but a novice in the sale of illegal drugs (J.A. 25-26, 38-39).[4] Respondent's assertion that

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2. Respondent has lodged with this Court a document entitled "Addendum A," which purports to be a supplemental presentence investigation prepared in the case. Respondent omits to note that this document was never presented to the District Court, whose decision is currently under review. It would seem that respondent desires the best of both worlds: to prevent the introduction of testimony by petitioners while at the same time holding his own *ex parte* "hearing" on appeal by the presentation of new evidence which is not subject to challenge, cross-examination or reply. This attempt is manifestly improper and impermissible. *Rebuck v. Vogel*, 713 F.2d 484, 486 (8th Cir. 1983); see Rule 10(a), Federal Rules of Appellate Procedure.

3. Peculiar indeed is respondent's assertion that, because the "heroin" given to him by the undercover police officer in exchange for the marijuana was not actually heroin, this somehow mitigates his criminal offense (Resp.Br. 4).

4. Respondent cannot, as he attempts (Resp.Br. 4), limit the facts before the sentencing judge to prior convictions. See *United States v. Papajohn*, 701 F.2d 760, 763 (8th Cir. 1983), which summarizes federal law and procedures on this subject.

he "may have had a meritorious entrapment defense" to the charge (Resp.Br. 4) rests solely upon various self-serving assertions he made while admitting guilt (J.A. 15-16). The sentencing court was entitled to note that respondent was preventing a hearing on this "entrapment" claim by pleading guilty, and further that respondent had exhibited a pattern of consistently denying responsibility for criminal conduct (see J.A. 26). In short, the record establishes that respondent had committed a major criminal offense and that his "past track record [was] not too good" (J.A. 43). The court could have sentenced respondent to an unlimited term of years or life imprisonment (J.A. 12), and much higher sentences have been imposed for similar crimes. See, e.g., *Abell v. State, supra* at 199. Instead, the sentencing judge imposed concurrent twenty-year sentences and, heeding respondent's plea for "alternatives to incarceration," suspended the execution of this sentence and placed respondent on closely-supervised probation for five years with the stated intention of extending probation another five years when the first term had expired (J.A. 42-47).[5] Under the record before this Court, the sentence imposed upon respondent was both reasonable and consistent with the facts.

B. The Probation Revocation Proceeding

While scoffing at petitioners' concern for the principles of federal-state comity (Resp.Br. 30, 39-40), respondent occupies fully half of his Statement of the Case in

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5. Contrary to footnote 1 of respondent's brief (Resp.Br. 2), this is precisely what was said by petitioners in their original brief (Petitioners' Brief 3, 37). Respondent's apparent implication in this footnote that the sentencing judge was precluded by Missouri law from imposing a second probation term is flatly refuted by *State ex rel. Carlton v. Haynes*, 552 S.W.2d 710, 715 (Mo. banc 1977).

requesting that this Court re-weigh the credibility of the witnesses who testified at the probation revocation hearing (J.A. 49-98), and concerning which the state judge issued written findings of fact (J.A. 103, 107-110). Given respondent's deep faith in the essential rightness of the federal court system over the state courts on matters of state law (Resp.Br. 42, n. 31; *but see* Pet.Br. 33), this attempt is understandable. However, respondent flatly ignores the dictates of 28 U.S.C. § 2254(d) and the numerous recent decisions of this Court holding that state court factual findings will be overturned on federal habeas review only if they lack even fair support in the record. *Marshall v. Lonberger*, 459 U.S. 422, 432, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983). In particular, determinations of the credibility of witnesses depend in large part upon demeanor, and as such "are peculiarly within a trial judge's province" (footnote omitted). *Wainwright v. Witt*, ... U.S. ....., 105 S.Ct. 844, 854, ... L.Ed.2d ..... (1985); see also *Patton v. Yount*, ... U.S. ....., 104 S.Ct. 2885, 2892, 81 L.Ed.2d 847, 858 (1984). Neither the Eighth Circuit nor the District Court below saw fit to cite or apply the principles of § 2254(d) in ruling that respondent had in fact violated the terms of his probation, an omission petitioners find difficult to justify. *Romano v. Black*, 735 F.2d 319, 320-321 (8th Cir. 1984); *Romano v. Black*, 567 F.Supp. 882, 885-886 (E.D.Mo. 1983). Nevertheless, no legitimate dispute remains on this factual question.

In addition to ignoring § 2254(d), respondent disregards a number of inconvenient facts in propounding his self-serving account of events. He repeatedly cites, as if it were significant, the fact that he was later convicted of careless and imprudent driving instead of the felony of leaving the scene of an accident (Resp.Br. 10-11, 34); in his Questions Presented, he misleadingly asserts that his pro-

bation was revoked "based upon conduct for which respondent was ultimately charged and convicted of careless driving" (Resp.Br. i).[6] As respondent is well-aware, a criminal conviction on a lesser charge, or even a complete acquittal, does nothing to affect the validity of a finding, based upon a lower standard of proof, that a probationer or parolee has committed certain criminal conduct which violates the terms of his probation or parole. *Taylor v. United States Parole Commission,* 734 F.2d 1152, 1155 (6th Cir. 1984), and cases cited therein. Here, the state Circuit Judge expressly found that respondent committed the felony of leaving the scene of an accident (J.A. 103, 107-110), and the record indubitably supports this finding. That being the case, respondent cannot escape the fact that he violated his terms of probation by committing this felony.

Of no greater merit are an assortment of other factual assertions by respondent. His claim that his conduct after the accident "proved that he did not intend to escape responsibility for his actions" (Resp.Br. 10) is adequately dealt with in petitioners' original brief (Pet.Br. 32-33); all that is shown by the record is an initial difficulty on respondent's part after the accident in "getting his story straight" (J.A. 71-73, 77-79, 83, 87). Respondent's assertion that his commission of a felony "had no relationship to [his] marijuana conviction" (Resp.Br. 11) is frivolous; the "relationship" was that the former crime was a felony committed two months after respondent was granted probation for the latter crime, which strongly indicated that respondent was not a suitable candidate for

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6. Given the uncooperative attitude of two of the state's principal witnesses, both occupants of the car which struck the victim (J.A. 54-58, 66-68, 90-94, 110), the state's decision to reduce the factual showing it was required to make was neither unreasonable nor unforeseeable.

probation. The statement by respondent that he did not intend to strike Timothy Bradley with his car (Resp.Br. 23) is irrelevant even assuming its truth; respondent was not revoked for deliberately running over Bradley, but for deliberately leaving the scene of this accident in violation of law.

Most egregious of all of respondent's factual misstatements regarding the probation revocation proceeding is his allegation that "[t]he probation revocation transcript and the court's 'Memorandum of Findings,' J.A. at 107-10, reflect that Judge Whipple revoked Romano's probation without considering alternatives to incarceration" (Resp.Br. 11). Leaving aside whether such alternatives are required to be considered, discussed *infra* and in petitioners' original brief, the present record is *completely silent* as to whether Judge Whipple considered possible measures other than imprisonment. Respondent, while unwilling to concede to the state court even its determinations of credibility based upon the demeanor of the witnesses, is uncommonly eager to "assume" that alternatives to incarceration were not considered merely because nothing was said on this subject at the revocation hearing. This graphically illustrates the error and gross injustice in denying the petitioners an evidentiary hearing in this case.

C. Respondent's Exhaustion of State Remedies

Respondent gives a piteous account of the difficulties he encountered in challenging his revocation of probation in the state courts, and seeks to ascribe blame to the State of Missouri (rather than to respondent himself) for the five-year delay between his revocation and the filing of the federal habeas corpus petition at bar (Resp.

Br. 3, 43). Respondent's course through the state forum was admittedly not smooth. The record establishes that challenges by respondent to his probation revocation were dismissed on procedural grounds by Circuit Courts in two counties: the county of respondent's revocation (Laclede County) and the county of his incarceration (Cole County). The decision by the Laclede County court was correct; that of the court in Cole County was erroneous.[7]

Respondent's outrage over this error, however, is contrived, because it has virtually nothing to do with the five-year hiatus in the present case. From the time of his revocation, respondent waited almost *three years* before filing *any* challenge in any court to the revocation decision. After his improper Laclede County action was dismissed, respondent filed the correct proceeding in Cole County; *two days* later, it was dismissed. Under well-established Missouri law (including *Abel v. Wyrick, supra,* which respondent had repeatedly cited in his state pleadings), he had the absolute right to file the same habeas corpus action in the Missouri Court of Appeals or Supreme Court. However, respondent chose to ignore this fact for more than two years, and filed such an action only after he was directed to do so in an Eighth Circuit opinion. *Romano v. Wyrick,* 685 F.2d 555, 557 (8th Cir. 1982). Then and only then, only a month before the federal habeas action at bar was ultimately filed, did respondent follow the

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7. Respondent's action under Missouri Supreme Court Rule 27.26 in Laclede County was subject to dismissal because this remedy cannot be employed to challenge revocation of probation, *Smith v. State,* 517 S.W.2d 148, 150 (Mo. 1974), and because the possible venues for a state habeas corpus petition were in the county of incarceration, the Court of Appeals for that judicial district, or the Supreme Court of Missouri. See *Abel v. Wyrick,* 574 S.W.2d 411, 415 (Mo. banc 1978).

required procedure.[8] As these facts demonstrate, it is frivolous for respondent to claim that the ruling of the Cole County Circuit Court "cost Romano almost three years of his life in the Missouri penitentiaries" (Resp. Br. 43).

II. RESPONDENT'S CONSTITUTIONAL THEORIES

A. Contrary to Respondent's Argument, the Imposition or Execution of Sentence in a Probation or Parole Revocation Is Constitutionally Indistinguishable From an Imposition of Sentence at the Time of Conviction, and the Two Should Be Judged by the Same Standards

The primary fallacy in respondent's analysis is his refusal to acknowledge that no constitutionally-cognizable difference exists, or should exist, between a sentencing decision following a verdict or plea of guilty and a similar decision after a finding that the conditions of probation or parole have been violated (Resp.Br. 36-37). When Nicholas James Romano was charged with the felonies of transfer and sale of a controlled substance, he was thereby cloaked with the numerous constitutional protections afforded a person who is criminally accused including the right to counsel, fair notice of the charges against him, a qualified right to discovery, the opportunity to present evidence and confront and cross-examine the witnesses against him, a fair and impartial trier of fact, and many others. After respondent had entered his plea of guilty to

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8. Characteristically, respondent offers no support whatsoever for his flat assertion that the merits of his state habeas petition were not before the Supreme Court of Missouri (Resp.Br. 3), and no such support exists. See *Abel v. Wyrick, supra* at 415.

these offenses (or had he been convicted of them), he continued to have three species of constitutional protections at the time of sentencing. First, he was entitled to certain minimal procedural safeguards, chief among which was the right to the assistance of counsel at sentencing. *Mempa v. Rhay,* 389 U.S. 128, 134-137, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); see also *Specht v. Patterson,* 386 U.S. 605, 608-611, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) (separate sentence enhancement statute cannot be applied to convicted defendant absent notice and hearing); *Gardner v. Florida,* 430 U.S. 349, 357-365, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (in capital case, cannot withhold information in presentence report from defendant). Second, the sentence imposed upon him could not rest upon false or materially erroneous information. *Roberts v. United States,* 445 U.S. 552, 556, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980). Finally, respondent's sentence could not itself suffer from some inherent constitutional defect—it could not, for example, constitute cruel and unusual punishment, *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), or unfairly single out indigents for their inability to pay a fine, *Tate v. Short,* 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971). Aside from these constitutional restrictions, however, the sentencing court was undisputedly entitled to impose *any* sentence upon Romano within the specified range of punishment, without the statement of reasons for its decision and without any *constitutional* review of the penalty assessed. All of the "alternatives to incarceration" vaunted by the District Court below, *Romano v. Black, supra,* 567 F.Supp. at 886, were available to the state court at the time of sentencing. Nevertheless, respondent makes no attempt whatever to assert, and could not legitimately claim, that the sentencing court would have been constitutionally required to consider alternatives to incarceration had it then sentenced him to imprisonment.

These principles demonstrate the incongruity of respondent's present theory and the holding of the court's below. This Court has expressly held that the full panoply of rights afforded the accused in a criminal prosecution do not apply to probation or parole revocation proceedings. *Morrissey v. Brewer,* 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Gagnon v. Scarpelli,* 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Thus, the elaborate and formal fact-finding procedures of a criminal trial are replaced with "an informal hearing structured to assure that the finding of a parole [or probation] violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's [or probationer's] behavior." *Morrissey v. Brewer, supra,* 408 U.S. at 484. Further, in many cases not all of the criminal penalties in the arsenal of the sentencing judge are available at the time of the revocation of probation or parole; some jurisdictions limit sentencing discretion after a probation revocation,[9] and other statutes restrict such alternatives as extended probation terms.[10] This is even more true of parole revocation, in which the only remedy is generally to remand the parolee to serve all or part of the balance of his prison

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9. E.g., *Mempa v. Rhay, supra,* 389 U.S. at 135. Contrary to respondent's assertion (Resp.Br. 3, n. 2), it has never been decisionally determined in Missouri whether, in a probation revocation following a suspended execution of sentence, the sentence originally imposed could be reduced. It is absurd for respondent to imply, by his citation of *State ex rel. Wagner v. Ruddy,* 582 S.W.2d 692 (Mo. banc 1979), that the sentencing judge somehow loses jurisdiction upon the imposition of probation; by that rationale, no revocation hearing could be held. See *State v. Bachman,* 675 S.W.2d 41, 46 (Mo.App. 1984).

10. E.g., W.Va.Code § 62-12-11 (1984); Ariz.Rev.Stat.Ann. § 13-902.

term.[11] That being the case, it is unsupportable for respondent to argue that federal constitutional scrutiny of probation or parole revocation as it relates to considering "alternatives to incarceration" is actually *greater* than that at the original sentencing.

The analogy between trial and revocation proceedings, and the principle that the constitutional protections adhering to the latter are no greater than those of the former, find support in decisional law. Just as a criminal trial or guilty plea consists of two different determinations, guilt and sentencing, so this Court has observed that probation and parole revocation involves a two-step analysis: whether a violation was committed and, if so, what punitive action should be taken. *Morrissey v. Brewer, supra*, 408 U.S. at 479-480. In both situations, the focus of the procedural protection is the validity and accuracy of the fact-finding process in the first stage; a convicted defendant may mount a constitutional attack upon the sufficiency of the evidence of his guilt, *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and so may a revoked probationer or parolee. *Douglas v. Buder*, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973). Similarly, the accused in either proceeding could complain if he were not afforded all of the procedural rights that were due him. See *Kartman v. Parratt*, 535 F.2d 450 (8th Cir. 1976). As with a convicted defendant, a revoked probationer or parolee cannot be subjected to a sentence which unnecessarily punishes him because of indigency. *Bearden v. Georgia*, 461 U.S 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). However, *no* authority cited by respondent or known to petitioners suggests that, as a matter of federal constitutional

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11. E.g., Fla.Stat.Ann. § 947.21 (West, 1983 Supp.); Ga. CodeAnn. § 42-9-44 (1983).

law, the federal courts may look over the shoulder of the revoking authority to determine what factors were considered in deciding the proper response to the probation or parole violation, and overturn this decision on sentence if alternatives to incarceration were not contemplated.[12] As the above principles demonstrate, such a holding is manifestly inconsistent with settled constitutional principles, as well as repugnant to the interests of federalism.

B. Respondent's Argument and the Holding Below Are Unsupported by Any Decision of This Court

The decisional justification offered by respondent, and by the Eighth Circuit, in support of the decision below focuses upon three statements or holdings in the opinions of this Court: (1) the assertion in *Morrissey* (408 U.S. at 479-480) that revocation is a two-step process, the second step of which is whether the parolee "should . . . be re-

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12. This argument gives rise to an interesting anomaly which respondent has made no attempt to explain. Many states, including Missouri, permit the court to suspend a criminal proceeding after the conviction or guilty plea and place the defendant on probation, with the stipulation that no sentence will ever be imposed unless the probation is revoked. § 549.071, RSMo, quoted in respondent's Appendix. A "suspended imposition of sentence" is not a final judgment and, if probation is successfully completed, it is not a "conviction" under Missouri law. *State ex rel. Peach v. Tillman*, 615 S.W.2d 514, 517 (Mo. App. 1981). This Court has held that such a deferred sentencing is governed by the same constitutional rules as a sentence immediately after conviction, in that the defendant has an *absolute* right to counsel. *Mempa v. Rhay, supra*, 389 U.S. at 134-137; cf. *Gagnon v. Scarpelli, supra*. If respondent's argument is that a decision on sentence following revocation is always to be judged by a different (and higher) constitutional test than that following a plea or finding of guilt, how can he harmonize the holding in *Mempa*? If respondent asserts that a suspended imposition of sentence is an exception to his proposed rule, how can he justify this distinction in due process terms?

committed to prison or should other steps be taken to protect society and improve chances of rehabilitation"; (2) the holding in *Morrissey* (408 U.S. at 489) that the parole revocation should contain "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole"; and (3) the ruling in *Bearden* (461 U.S. at 672) that an indigent probationer cannot be incarcerated by reason of his good-faith inability to pay a fine or restitution unless alternatives to incarceration are considered (Resp.Br. 14-17, 22-24; *Romano v. Black, supra,* 735 F.2d at 321-322).

The respondent's reliance upon the "two-step" language in *Morrissey* seems to reflect an inability to distinguish between language in the opinions of this Court which analyze the factual context underlying the issue with which it is faced, and language which promulgates an actual constitutional rule.[13] The above-quoted language is perfectly true; after a probation or parole violation is found, the revoking authority does generally consider whether incarceration or some other method of dealing with the violator is the proper remedy. However, *exactly the same* is true of a judge who makes the sentencing decision after a conviction or guilty plea—it is for him to

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13. Respondent's blurring of this distinction is keenly illustrated by his statement that this Court held as a matter of due process in *Morrissey* that "[p]robation should be revoked only when the trial court is convinced that the probation violator's conduct is so serious that he or she 'cannot be counted on to avoid antisocial activity.' *Morrissey*, 408 U.S. at 479" (Resp.Br. 15). The actual statement in *Morrissey* is as follows:

> *Typically*, a parolee will be counseled to abide by the conditions of parole, and the parole officer *ordinarily* does not take steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity" (emphasis supplied). *Id.*

decide whether prison, a fine, probation, community service, or some other creative alternative is proper—yet this fact has not been (and should not be) metamorphosed into a federal constitutional right to the consideration of alternatives to incarceration at the time of sentencing. Even casual or incidental statements by this Court are taken seriously by the lower state and federal courts. See *Hendricks County Rural Electric Membership Corp. v. N.L.R.B.*, 627 F.2d 766, 768 (n. 1) (7th Cir. 1980), *reversed*, 454 U.S. 170, 102 S.Ct. 216, 70 L.Ed.2d 323 (1981). Here, petitioners submit, this reliance is misplaced and cannot sustain the constitutional doctrine propounded by the courts below.[14]

Nor can a constitutional requirement to consider alternatives to incarceration be generated from the mere requirement of a written statement as to the evidence and reasons for revocation. *Morrissey v. Brewer, supra*, 408 U.S. at 484. Even assuming that this requirement is intended to apply to a probation revocation hearing on the record before the sentencing judge (*but see* Pet.Br. 21), nothing in it suggests or implies that the revoking authority is required to consider alternatives to incarceration in arriving at its "reasons." The sufficiency of a written statement can only be evaluated according to the policies which support the requirement of such a statement: "to allow the reviewing court to determine whether

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14. Respondent also cites this "two-step" language, quoted in the petitioners' brief before the Eighth Circuit, as constituting an admission by petitioners in the Court of Appeals that alternatives to incarceration had to be considered (Resp.Br. 18, n. 17). For the reasons stated above, this assertion is frivolous. Petitioners' position is the same in this Court as below: that a state court revoking probation or parole was not required to affirmatively consider alternatives to incarceration. Never have petitioners implied, let alone admitted, that such consideration is a matter of constitutional right.

there was a factual basis for revocation and to provide a probationer with a record of the proceedings so as to protect him from a second revocation proceeding based on the same conduct." *Kartman v. Parratt, supra* at 457-458. In the present case, the sole issue in the revocation hearing was whether respondent was guilty of the felony of leaving the scene of an accident. The state court unambiguously found that respondent was guilty (J.A. 107-110), and this was the only "reason" for revocation. "It would be strange indeed if the formal requirements of fact finding and determination of guilt were to be more strict at a probation revocation hearing than at an original criminal trial." *State v. Jaworski*, 194 Neb. 645, 234 N.W. 2d 221, 223 (1975).[15]

Entirely independent of his claim that alternatives to incarceration should have been considered, respondent advances the proposition that this Court can review the revocation of his probation as a matter of "abuse of discretion," citing *Burns v. United States*, 287 U.S. 216, 53 S.Ct. 154, 77 L.Ed. 266 (1932). *Burns* dealt specifically with a revocation under *federal law*, and contains no constitutional holding whatsoever. *Id.*, 287 U.S. at 220-223. Respondent offers no pertinent authority, and petitioners find none, holding that federal courts may review state probation or parole revocation for an "abuse of discretion."

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15. Respondent's discussion of *Bearden v. Georgia, supra* (Resp.Br. 22-24) is adequately addressed in petitioners' original brief (Pet.Br. 15, 23-24), and in the brief of the *amicus curiae*, and will not be repeated here.

C. Respondent's Proposed Construction of the Constitution to Require Consideration of Alternatives to Incarceration Is Contrary to Serious Policy Considerations, and May Well Act to the Prejudice of Potential Probationers

In seeking to justify the new "constitutional" doctrine promulgated by the courts below, respondent bewails the danger of "unbridled discretion" in probation or parole revocation (Resp.Br. 26); at the same time, he admits that this doctrine would *not* be any real check upon the discretion of the revoking authority (Resp.Br. 30-31). By respondent's own account, it seems, the requirement that alternatives to incarceration be affirmatively considered would serve only one significant purpose: to afford state prison inmates whose probation or parole has been revoked an even greater scope to file a flood of technical challenges in federal court to their revocation proceedings. The proposed "constitutional standard" drafted by respondent (Resp.Br. 32-33) is a litigator's playground; what is sufficient to constitute a "reasoned explanation," when would respondent's stated exception to the requirement apply, and what if some reviewing federal court conjured up an "alternative" that the state court failed to consider? Respondent's unbridled eagerness to convert the federal courts into another state appellate forum in revocation proceedings is evident from his brief: he seeks to relitigate not only his probation revocation but his guilty plea, he ignores the credibility determinations of the state hearing court, and he asks this Court to reexamine the decision to revoke probation as an "abuse of discretion." However, the proposed expansion of constitutional supervision over state probation and parole revocation would be anything but beneficial to an overtaxed federal judicial system, it would be even less so to the state courts for

the reasons aptly stated in *Engle v. Isaac*, 456 U.S. 107, 126-128, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), and by respondent's own admission it would not prevent an arbitrary or oppressive revocation if the revoking authority had it in its mind to do so.

In one respect, and one only, respondent is correct: probation and parole are desirable alternatives in appropriate cases (Resp.Br. 25).[16] For that reason as well, respondent's effort to apply a *higher* standard of due process to sentencing decisions after revocation than to such decisions after the original plea or finding of guilt (see Part IIA of this brief, *supra*) could not be anything other than harmful to the interests of persons who might be eligible for probation or parole. Under the doctrine established by the courts below, a decision to place a convicted defendant on probation would create the risk that, if that individual's probation were later revoked and the "right" words were not used in ordering revocation, the court's sentencing decision could be relitigated by federal habeas corpus and might be overturned years later and a new revocation hearing ordered—or, as in this case, the probationer might be simply discharged with no further recourse by the state. On the other hand, a decision by the judge to send the defendant to prison at the time of original sentencing would be unreviewable, so long as the sentence was not inherently unconstitutional. Trial judges would be other than human if such a situation did not influence to some degree, even unconsciously, their decisions on sentencing. Given the allegation by respondent and the District Court that the state

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16. On the other hand, respondent's theory that the right to due process in probation or parole revocation fluctuates according to the probation and parole statistics (Resp.Br. 15, n. 12; 27-29) is unsupportable under *Morrissey*, *Gagnon* or any other pertinent decision of this Court.

Circuit Court in the present case "harbored a disposition to send Romano to jail" (Resp.Br. 6; *Romano v. Black, supra*, 567 F.Supp. at 886)—unsupported by a scintilla of evidence though this allegation may be—one wonders why they would desire the constitutional construction they espouse.

D. No Reasonable Constitutional Construction Supports the District Court's Denial of Petioners' Request for an Evidentiary Hearing or Its Discharge of Respondent From Custody

These issues are adequately addressed in petitioners' original brief (Pet.Br. 28-40) and petitioners stand upon that discussion.

CONCLUSION

For the reasons stated in this brief and petitioners' original brief, the decision of the Eighth Circuit should be reversed and respondent returned to his status as a parolee in the custody of the Missouri Division of Probation and Parole.

Respectfully submitted,

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